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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 399

DANIEL ROWAN, d.b.a. AMERICAN BOOK SERVICE, et al.,
Appellants,

against

UNITED STATES POST OFFICE DEPARTMENT, et al.,
Appellees.

BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF AFFIRMANCE

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Interest of the *Amicus*

Louis J. Lefkowitz, Attorney General of the State of New York, and as such the principal law officer of the State of New York, submits this brief *amicus curiae* in support of affirmance of the decision of the Court below pursuant to Rule 42 of the Revised Rules of the Supreme Court of the United States.

The State of New York, with a population in excess of eighteen million persons, has been greatly concerned with the related problems of obscenity and pandering advertisements for obscene matter.

New York has recognized that obscenity does not exist in a vacuum; that material is not inherently "obscene"

but rather obscene only in relation to the group at which the material is directed. As a result, New York has enacted penal laws proscribing the dissemination of certain matter to minors under 17 years of age even though the material may be distributed to adults. New York Penal Law §§ 235.20, 235.21 and 235.22.

The concept of a variable standard of obscenity, suggested by this Court in *Mishkin* v. *New York*, 383 U. S. 502 at 508, 509, has permitted New York and other jurisdictions to penalize public pollution without abridgment of the rights of free expression.

The problem of mail advertisements originating out of state for material that is either obscene or offensive is much more vexing. The Attorney General of the State of New York has received thousands of complaints from recipients of unsolicited advertisements for obscene material including material specifically directed towards sexually deviant audiences.

In many instances, the complainants were the educators or parents of young children. The tenor of these complaints is markedly similar. The writers are particularly frightened that the advertisements for materials graphically depicting sodomy and other deviate sexual conduct will fall into the hands of impressionable children.

The writers are also disturbed by the possibility that these advertisements will destroy the ethical and religious values the writers have taught to children and thereby impair both the moral standards of the young and parental authority. Finally, there is the frustration felt by many people that they are powerless to prevent the intrusion of this pollution into their homes.

Since only Congress is empowered to curtail the *mailing* of unwanted material to unwilling recipients,[1] the State of New York files this brief as *amicus curiae* in support of Congress' exercise of legislative power in enacting Public Law 90-206, the law here in issue.

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[1] United States Constitution, Article I, Section 8.

Question Presented

Does Section 301 of Public Law 90-206 abridge appellants' right of free speech?

Statutory Provision Involved

Public Law 90-206 (81 Stat. 645), as subsequently codified as 39 U.S.C. (Supp. IV) 4009, provides:

> "§ *4009. Prohibition of pandering advertisements in the mails.*
>
> (a) Whoever for himself, or by his agents or assigns, mails or causes to be mailed any pandering advertisement which offers for sale matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative shall be subject to an order of the Postmaster General to refrain from further mailings of such materials to designated addressees thereof.
>
> (b) Upon receipt of notice from an addressee that he has received such mail matter, determined by the addressee in his sole discretion to be of the character described in subsection (a) of this section, the Postmaster General shall issue an order, if requested by the addressee, to the sender thereof, directing the sender and his agents or assigns to refrain from further mailings to the named addressees.
>
> (c) The order of the Postmaster General shall expressly prohibit the sender and his agents or assigns from making any further mailings to the designated addressees, effective on the thirtieth calendar day after receipt of the order. The order of the Postmaster General shall also direct the sender and his agents or assigns to delete immedately the names of the designated addressees from all mailing lists owned or con-

trolled by the sender or his agents or assigns and, further, shall prohibit the sender and his agents or assigns from the sale, rental, exchange, or other transaction involving mailing lists bearing the names of the designated addressees.

(d) Whenever the Postmaster General believes that the sender or anyone acting on his behalf has violated or is violating the order given under this section, he shall serve upon the sender, by registered or certified mail, a complaint stating the reasons for his belief and request that any response thereto be filed in writing with the Postmaster General within fifteen days after the date of such service. If the Postmaster General, after appropriate hearing if requested by the sender, and without a hearing if such a hearing is not requested, thereafter determines that the order given has been or is being violated, he is authorized to request the Attorney General to make application, and the Attorney General is authorized to make application, to a district court of the United States for an order directing compliance with such notice.

(e) Any district court of the United States within the jurisdiction of which any mail matter shall have been sent or received in violation of the order provided for by this section shall have jurisdiction, upon application by the Attorney General, to issue an order commanding compliance with such notice. Failure to observe such order may be punished by the court as contempt thereof.

(f) Receipt of mail matter thirty days or more after the effective date of the order provided for by this section shall create a rebuttable presumption that such mail was sent after such effective date.

(g) Upon request of any addressee, the order of the Postmaster General shall include the names of any of his minor children who have not attained their nineteenth birthday, and who reside with the addressee.

(h) The provisions of subchapter II of chapter 5 (relating to administrative procedure) and chapter 7 (relating to judical review) of part I of title 5, United States Code, shall not apply to any provisions of this section.

(i) For the purposes of this section—

(1) mail matter, directed to a specific address covered in the order of the Postmaster General, without designation of a specific addressee thereon, shall be considered as addressed to the person named in the Postmaster General's order; and

(2) the term "children" includes natural children, stepchildren, adopted children, and children who are wards of or in custody of the addressee or who are living with such addressee in a regular parent-child relationship."

ARGUMENT

POINT I

39 U.S.C. § 4009 does not abridge freedom of the press or the right of free speech.

Appellants, book publishers and distributors, owners of mail order houses, list brokers and sellers of books and other items through the mails, have attempted to elevate a modest regulation upon their obviously commercial activities into a question relating to the free expression of ideas.

This Court has held "that obscenity is not within the area of constitutionally protected speech or press." *Roth* v. *United States*, 354 U. S. 476, 485. This holding has recurred in differing forms in many subsequent cases. *E.g.*

Smith v. *California*, 361 U. S. 147, 152; *Ginsberg* v. *New York*, 390 U. S. 629; *Stanley* v. *Georgia*, 394 U. S. 557. Obviously if the materials advertised or the advertisements themselves are obscene, the statute does not interfere with the freedom of the press.

Even if appellants' material is not obscene, the solicitation of magazines for purely commercial purposes may be controlled or proscribed for purposes that lie within the public interest. *Valentine* v. *Chrestensen*, 316 U. S. 52; *Breard* v. *Alexandria*, 341 U. S. 624.

In *Breard* v. *Alexandria*, *supra*, this Court, in sustaining the constitutionality of a so-called "Green River ordinance" of a municipality which prohibited, *inter alia*, door-to-door solicitation of subscriptions for innocuous magazines without prior consent, stated (p. 645):

> "• • • It would be, it seems to us, a misuse of the great guarantees of free speech and free press to use those guarantees to force a community to admit the solicitors of publications to the home premises of its residents. We see no abridgment of the principles of the First Amendment in this ordinance."

Since the commercial distribution of written matter has been held to be subject to regulation by local governments in the exercise of their police power (*Breard* v. *Alexandria*, *supra*), there should be no doubt as to the power of Congress, through its control over the mail,* to relieve householders of the burden of receiving commercial advertisements through the mail to which the recipients have expressed strong antipathy.

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* The authority of Congress to bar other forms of written communication from the mail, despite the protections afforded by the First Amendment, has long been recognized by this Court, most notably in schemes for obtaining money through fraudulent pretenses. *Public Clearing House* v. *Coyne*, 194 U. S. 497; 39 U.S.C. § 4005.

The material offered for sale by the appellants is clearly devoid of any ideological content. Since the material does not serve to communicate ideas or disseminate information, except perhaps to the deviant and perverted who might find it informative or entertaining or both, the material is not entitled to the rights secured by the First Amendment.

The fact that appellants' advertisements are no more than the commercial exploitation of erotica solely for the sake of prurient appeal clearly labels this material as obscene. *Ginzburg* v. *United States*, 383 U. S. 463.

POINT II

39 U.S.C. § 4009 is a legislative implementation of the right to privacy.

Upon the faulty premise that their advertising is expression protected by the First Amendment, appellants suggest that an audience must be provided.

Appellants' contention ignores each citizen's right of privacy which has been called "the right most valued by civilized men." Mr. Justice Brandeis dissenting in *Olmstead* v. *United States*, 277 U. S. 438, 478. *Amicus* respectfully submits that the paramount right of privacy would be invaded by the appellants if the statute in issue is enjoined. The Court has manifested its interest in the quiet enjoyment of the home and has protected this right even against opposing claims involving the exercise of the police power. *Stanley* v. *Georgia*, 394 U. S. 557; *Griswold* v. *Connecticut*, 381 U. S. 479; *NAACP* v. *Alabama*, 357 U. S. 449.

Certainly, if the Court can counterpoise freedom from unwanted intrusion in the home against the exercise of police power and find the former to be of greater weight, this Court should sustain the right of privacy against the noxious effluent the appellants seek to force upon unwilling recipients under the guise of the exercise of free speech.

CONCLUSION

The decision of the Court below should be affirmed.

Dated: New York, New York, January 7, 1970.

Respectfully submitted,

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